

May 19, 2006

VIA ELECTRONIC MAIL TO: wcohen@waterboards.ca.gov

Ms. Wendy Cohen
Policy and Planning Unit
Irrigated Lands Conditional Waiver Program
Regional Water Quality Control Board – Central Valley Region
11020 Sun Center Drive, #200
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**RE: COMMENTS ON TENTATIVE CONDITIONAL WAIVERS OF WASTE DISCHARGE
REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS – PROPOSED ORDERS**

Dear Ms. Cohen:

The Agricultural Coalition and the Watershed Water Quality Coalitions (the “Coalitions”), which are implementing the Irrigated Lands Program Waiver (“ILP Waiver,” received the April 19, 2006 Notice of Public Hearing on the ILP Waiver. We have reviewed the Central Valley Regional Water Quality Control Board (“Regional Board”) Staff’s Proposed amendment and extension of the existing ILP Waiver (Resolution R5-2003-0105), which the Regional Board moved to extend through June 30, 2006 on November 28, 2005.

The following are the Coalitions’ initial comments in compliance with the May 19, 2006, response deadline as to: 1) the ILP Waiver extension/amendment process; 2) the Tentative Coalition Group Conditional Waiver [Proposed] Order No. R5-2006-XXXX (15 pages); 3) *Attachment A*, the Definitions and Information Sheet (5 pages); and 4) *Attachment B*, the Terms and Conditions (10 pages), hereinafter referred to as the “Proposed Waiver.”

COMMENTS

A. Coalition Involvement

The Coalitions have been involved in the ILP Waiver issue before the original ILP Waiver (R5-2003-0105) was even promulgated, and have continued to actively participate in the Waiver’s implementation, the Monitoring and Reporting Program (“MRP”) modifications, the Technical Issues Committee and focus groups throughout the process. The Coalitions also appeared before the Regional Board in November 2005, when the existing ILP Waiver was extended for six months until June 2006. The Coalitions supported the Regional Board’s decision not to embrace the original Staff tentative Waiver which had been proffered in Fall 2005 to extend the existing ILP Waiver through June 2006 to allow Staff and interested parties to work out some important issues posed by the ILP Waiver as then proposed.

The Coalitions also embraced the Regional Board's directive to participate in the policy discussions for the purposes of addressing and attempting to resolve the outstanding issues in the ILP Waiver, which included: 1) facilitating the Regional Board's identification of Coalition participants, and 2) clarifying "what is a discharge" or "who is a discharger," subject to the provisions of the ILP Waiver. Throughout the past six months, Coalition representatives worked closely with Staff and other stakeholders to fulfill the Regional Board's request that these issues be resolved prior to the conclusion of the June extension and the June Board meeting. A general accord has been reached as a result of the tireless efforts of all the participants. As our detailed comments will further reflect below, each of those issues have been resolved to the general satisfaction of every participating stakeholder, although each side had to make adjustments in prior positions to reach agreement within this timeframe. Particular credit should be given to the Executive Officer Pamela Creedon, Assistant Executive Officer Ken Landau, and the ILP Manager Bill Croyle. Unfortunately and regrettably, the three representatives appointed to the Policy Negotiating Group from the environmental community chose not to participate in the process throughout the dozens of meetings, committees, and conference calls.

In addition to these two key issues, which the Regional Board compelled stakeholders and Staff to resolve, the Proposed Waiver contains numerous other amendments to "clean up" and to address issues of consistency with many other Board policies, etc. Upon review of these amendments, two general observations are merited:

1. It is unfortunate the amendments are so extensive and address many more subjects than necessary. The extensiveness of the amendments has created difficulty for interested parties to focus on the key substantive changes. In addition, some changes insert ambiguity or potential internal conflicts, raising concerns that there may be detrimental changes hidden within the extensive amendments or which may have been inadvertently inserted.

2. Notwithstanding the foregoing point, the Coalitions take the position that the Proposed Waiver, though it may not take the form of precisely what the Coalitions would have suggested, is generally an acceptable set of amendments, subject to the few specific points addressed herein. The Coalitions believe the few specific issues discussed below can be easily remedied by Staff revisions prior to the upcoming Public Hearing. Based thereon, and assuming the following issues can be clarified or adjusted, the Coalitions support the adoption of such modified extension of the ILP Waiver.

B. The Coalition Group Tentative Waiver Order No. R5-2006-XXXX:

Point 1: *Findings Nos. 13 and 14* address the "membership list" issue and appropriately characterize the participant or non-participant identification process arising from the Policy Negotiating Group's ("Policy Group's") agreement. However, this language must be made parallel to the language in all other references to the "membership lists" in the Proposed Waiver (i.e., see Attachment B, ¶ A, Attachment B, Section B, ¶ 1, and the Notice of Intent, Section 1).

These sections must be amended to harmonize with or appropriately reference the agreed-upon language. The Proposed Waiver compels Coalitions to provide either a map or a list of

members/participants or non-members/participants such that the Regional Board can ascertain which landowners are or are not participating in Coalitions.

Point 2: ***Finding 1, page 1 and Finding 32, page 7*** are overly broad in that they can be interpreted that all irrigated cropland results in “discharges of waste.” This is not the case, and is further recognized and clarified by other provisions in the Proposed Waiver.

These Findings should be amended as follows:

Finding 1: “operations generating or having the potential to generate wastewater...”

Finding 32: “...who discharge or have the potential to discharge waste...”

Point 3: ***Finding No. 35*** includes language stating the obvious, that the ILP Waiver does not authorize any “illegal activity.” The ILP Waiver, at its heart, allows certain discharges to surface waters of the State. Such discharges in accordance with the ILP Waiver are, therefore, not illegal. (See Cal. Wat. Code, § 13269.) However, the language proposed in Finding 35 is too vague to provide any indication of its purpose and, as such, contains substantial potential for abuse. To the extent this phrase serves an important purpose for the Regional Board, the Coalitions suggest that the Regional Board rephrase this with a statement that the ILP Waiver “shall not be interpreted in a manner inconsistent with any other law, including the federal Clean Water Act.”

Point 4: ***Findings Nos. 40 through 43*** deal with the long-awaited clarification of “what is a discharge” and “who is a discharger,” subject to the terms of the ILP Waiver. This clarification was also negotiated in the Policy Negotiating Group, and these paragraphs accurately reflect those discussions and agreement.

Also, during the Policy Group discussions, there was an agreement reached that Staff would develop an interpretive question-and-answer clarification document. It is referenced in Finding 43, but is not contained in or attached to this Proposed Waiver. The question and answer document should be developed and promulgated contemporaneously with passage of the ILP Waiver. That clarification piece is not only important, it is fundamental to the agreement. The need to clarify the “what is a discharge” and the “who is a discharger” questions has been a key hurdle in interpreting and implementing the existing ILP Waiver.

Further, the opening reference to “discharger” in Attachment B must parallel the language agreed upon by the Policy Group discussions, as reflected in Findings Nos. 13, 14, and 40 through 43 of the Proposed Waiver.

Point 5: ***Findings Nos. 51 and 62*** indicate that when a problem is identified in monitoring, the Executive Director may call for the adoption of a Management Plan. This is a fundamental component to ensure the ILP Waiver identifies, and also results in actions to address water quality problems. However, Findings 51 and 62 should explain the two other new components to the ILP Waiver Monitoring and Reporting Program (“MRP”): 1) the Exceedence Report, and

2) Communication Reports. The Exceedance Report calls for the Coalitions to timely report to the Regional Board any monitoring result that indicates an exceedance of a water quality objective. The Communication Reports are required to be filed following the Exceedance Report, state “how it [the Coalitions] will evaluate the effectiveness of management practice(s) to prevent such exceedances.” (MRP at p. 12.)

Point 6: ***Finding No. 62*** sets out a trigger upon which the Coalitions must conduct additional evaluation and improvement of best management practices where the agricultural discharge causes an exceedance of water quality objectives within the respective basin plan. The Proposed Waiver attempts to alter this established trigger by incorporating language from the federal Clean Water Act, which expressly exempts agricultural discharge from federal point source regulation. (33 U.S.C. § 1362 (14) [“This term [point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture”].) The phrase, “caused or contributed to exceedances,” is language for point source permitting arising from the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and has no independent basis under California’s non-point source regulatory scheme as set forth in the Porter-Cologne Water Quality Control Act, Cal. Wat. Code, § 13000 *et seq.* (See 33 U.S.C., § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i) [requiring National Pollutant Discharge Elimination System (“NPDES”) permits to include water quality based effluent limitations whenever the permitting agency determines that pollutants will cause or contribute to exceedances of water quality standards].)

As a practical matter, this heightened standard imposes an additional burden on the participating Coalitions where *any* amount of a pollutant is identified in the agricultural waters, rather than where the agricultural discharge actually exceeds the water quality objective. For example, under the proposed language, the Proposed Waiver penalizes the Coalitions for any trace of a pollutant resulting from agricultural discharge, though individually insignificant, where the agricultural discharge combines with a significant discharge of a neighboring point source already independently exceeding the water quality objectives. (See Proposed Waiver, p. 6, ¶ 24, p. 7, ¶ 29.) Such a penalty contradicts the ILP Waiver program and the longstanding federal exemption from NPDES permits.

Point 7: ***Order, at No. 10:*** The Proposed Waiver extends the existing ILP Waiver from July 1, 2006 to June 30, 2011. This is in compliance with the California Water Code, and is justified to provide stability to the implementation of the ILP Waiver.

Point 8: ***Attachment A, Definitions 2 and 3:*** As indicated above, the definition of “discharger” must be made parallel with other sections of the Proposed Waiver (see Findings Nos. 40 through 43).

Point 9: ***Definition 16*** defines a “Water District” as a discharger if they:

“accept or receive discharges from irrigated lands and discharge or threaten to discharge irrigation reflow, tailwater, drain water...and/or stormwater.”

Water Districts take issue with this language because this language makes a water district a “discharger” by merely accepting, transferring, or conveying tailwater, without adding waste to such water. This language is, therefore, overly broad.

Point 10: **Attachment A, Information Sheet:** The Information Sheet was an addition to the existing ILP Waiver as a result of the Sacramento County Superior Court mandate of May 10, 2005, for purposes of adding clarification of the scope of the Tributary Rule. After remand by the Court, this language was settled on by the Regional Board and interested parties.

Point 11: **Attachment B:** The opening paragraph of this Attachment makes reference to both of the previously addressed issues of “membership lists” and “discharger.” This language should be parallel to that agreed upon by the Policy Group discussions, and as reflected in the Proposed Waiver in Findings Nos. 13, 14, and 40 through 43.

Point 12: **Attachment B, Paragraph A:** The language regarding “membership/participant lists” should also be made fully parallel with the language in the Proposed Waiver at Findings Nos. 13 and 14.

Point 13: **Attachment B, Paragraph 9:** There is a fundamental problem in this section. It is not a new amendment, but is a problem that has not yet been addressed in the ILP Waiver. The language provides a total prohibition for any discharger to “cause new discharges, increase discharges or add a new waste.” This language is unclear and could be misinterpreted to mean that a farmer cannot change his cropping pattern or farming practices. This is not only a wholly inappropriate prohibition, it may be counterproductive. Changes in discharge can result from cropping pattern changes, weather changes, pest infestation or changing agricultural practices. The ILP Waiver should not make it illegal to change crops or to appropriately address new or different weather or pest infestations. This language would also be counterproductive in situations when a producer wants to change practices to replace or mitigate a situation that has been causing a water quality problem or an air quality problem. This language makes even such helpful changes unlawful. Therefore, this language should be modified before such an inappropriate interpretation is advocated or enforcement or litigation occurs.

Point 14: **Attachment B - Technical Reports:** As stated previously, the reference to the “membership list” language must be made parallel with the language in the Proposed Waiver at Findings Nos. 13 and 14.

Point 15: **Water Quality Standards:** The Proposed Waiver overhauls the existing ILP Waiver by changing all references to “water quality objectives” to “water quality standards.” In so doing, the Proposed Waiver further defines “water quality standards” as basically what the Coalitions have long perceived to be the “water quality objectives.” (See Attachment A, ¶ 18.) This change has no apparent purpose or benefit, but contains substantial potential for abuse. The phrase “water quality standards” has meaning under the federal Clean Water Act. In fact, the Environmental Protection Agency’s implementing regulations define water quality standards as “provisions of State or Federal law which consist of a designated use or uses for the waters of the

United States and water quality criteria for such water based upon such uses...” (40 C.F.R. § 131.3(i).) The Regional Board has not undertaken the exercise contemplated by this regulation to adopt water quality standards applicable to the discharges covered by the Proposed Waiver. Thus, the insertion of “water quality standards” into the Proposed Waiver creates considerable confusion and the Coalitions prefer the continued use of the term “water quality objectives.” (These amendments appear throughout the Proposed Waiver.)

Further, Attachments A and B of the Proposed Waiver demand that “specific numeric levels to comply with the applicable water quality standards will be set forth in the Monitoring and Reporting Program.” (See e.g., Attachment A, p. 1; Attachment B, p. 7.) Though the Coalitions understand that the Regional Board seeks to have a target level for which to move all agricultural water bodies into full compliance with the water quality objectives, this proposed requirement is inherently inconsistent with the Proposed Waiver as otherwise set forth. The Coalitions urge the Regional Board to delete these references to specific numeric levels in order to maintain the integrity of the ILP Waiver. Specific numeric water quality standards cannot be adopted outside of the regulatory process set forth by the Legislature. (Cal. Water Code, §§ 13241-13245.) Any attempt, whether intentional or inadvertent, to undermine the established regulatory procedure will be fatal to the ILP Waiver and will subject the Regional Board to clean up these apparently inadvertent, yet detrimental, statements in the Proposed Waiver.

Point 16: ***Attachment B – Paragraph C:*** The reference to Attachment A must be clear. It needs to be specifically clarified that this reference is to Paragraph 18 of Attachment A of the Proposed Waiver, and not some other Regional Board policy or document.

C. Conclusion

As reflected in the above comments, the Coalitions strongly urge the Staff or the Regional Board Members to amend the above-described provisions within the Proposed Waiver. The Coalitions have acted and continue to act in good faith compliance with the ILP Waiver conditions and the Basin Plan water quality objectives.

Thus, the Coalition Groups asks the Staff and the Regional Board to critically analyze and amend these few, but important, provisions in the Proposed Waiver as set forth in these comments. Those amendments can be summarized by six amendment areas listed below:

- 1) Coordinate all references to the “membership list” issue and the “discharge/discharger” issue by using similar language in each section or by utilizing references. (Findings 13, 14, Attachment B at (B) ¶1, and NOI section 1 regarding “membership lists,” and Findings No. 40 through 43, Attachment A definitions 2 and 3, Attachment B regarding “discharge/discharger.”) [Addressed in these comments at points 1, 4, 8, 11, 12, 14.]
- 2) Amend language regarding “illegal activity” to clarify intended meaning so as to avoid unnecessary ambiguity. (Findings 35 and 62.) [Addressed in these comments at points 3 and 6.]

3) Amend language to clarify water districts are only dischargers if they add waste and discharge such to waters of the State. (Definition 16.) [Addressed in these comments at point 9.]

4) Clarify language, to avoid interpretation that changing crops or practices, which can alter discharge, is illegal. (Attachment B, ¶ 9.) [Addressed in these comments at point 13.]

5) Amend references to “water quality standards” and “specific numeric limits” to make consistent with the ILP Waiver program. (Throughout the Proposed Waiver.) [Addressed in these comments at point 15.]

6) Clarify that the reference to Attachment A is to paragraph 18 of that attachment. (Attachment A, ¶ 18.) [Addressed in these comments at point 16.]

Respectfully submitted,

[/s/ William J. Thomas](#)

By: WILLIAM J. THOMAS
On behalf of the AGRICULTURAL COALITION and
the WATERSHED WATER QUALITY COALITIONS